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Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

PURITEC, LLC,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Superior Court of California, in a judgment affirmed on appeal to the Court of Appeal, and review of which has been denied by the California Supreme Court, has held an out-of-state manufacturer and seller of water treatment devices liable for civil penalties because statements made in its internet website-based advertising of its water treatment devices do not conform to California's unique laws regulating the advertising of these devices. This decision raises the following substantial federal questions that warrant review by this Court:

1. Whether a state's attempted regulation of the website advertising of an out-of-state manufacturer and seller of consumer products, where the regulated advertising is neither inherently false nor expressly directed at the consumers of that state, conflicts with the federal government's exclusive power under the Dormant Commerce Clause of the United States Constitution to regulate interstate commerce.

2. Whether a state's attempted regulation of the website advertising of an out-of-state manufacturer and seller of consumer products, where the regulated advertising is neither inherently false nor expressly directed at the consumers of that state, violates the commercial free speech rights of the manufacturer and seller under the First Amendment of the United States Constitution.

3. Whether California Health & Safety Code sections 116835 *et seq.* and Business & Professions Code sections 17577 *et seq.*, authorizing the state to penalize manufacturers and sellers of water

treatment devices for making "product performance claims" and "product health claims" in advertising about their devices, unless the devices are certified by the State of California, are facially invalid infringements of the right of Free Speech under the First Amendment because they are excessively vague.

4. Whether a party may argue on appeal that a statute is unconstitutionally vague as a matter of law, although a representative of the party testified at trial that he understood the statute during cross examination at trial.

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OPINIONS BELOW

The final judgment and statement of decision of the Superior Court of California for the County of Sacramento, is not reported. Petitioner's Appendix (Pet. App.) A1-A13. The decision and opinion of the Court of Appeal is reported at *People ex rel Brown v. PuriTec*, 153 Cal. App. 4th 1524, 64 Cal. Rptr. 3d 270 (2007). Pet. App. A14-A34. The decision of the California Supreme Court denying review of the Court of Appeal's decision has not been reported yet. Pet. App. A35.

JURISDICTION

The judgment of the trial court was entered on January 27, 2006. A notice of appeal was filed on March 21, 2006, and the case was docketed on the same day. (3d Dist. Ct. App. No. C052167). The Court of Appeal affirmed the judgment or August 7, 2007, and modified its opinion without change to the judgment on August 15, 2007. *People ex rel Brown v. PuriTec*, 153 Cal. App. 4th 1524, 64 Cal. Rptr. 3d 270 (2007). A petition for review before the California Supreme Court was filed on September 17, 2007. The California Supreme Court denied review on November 28, 2007. Pet. App. A35. The jurisdiction of this Court rests on 28 U.S.C. §1257.

RELEVANT STATUTES

The State of California has codified its regulation of advertising about water treatment devices in two separate but parallel bodies of law. Section 17577.2 of the California Business & Professions Code provides, in relevant part:

> It is unlawful for any person to do any of the following in connection with the sale, lease, rental, offer to sell, lease, rent, or other disposition of water treatment devices:
>
> . . . .
>
> (c) . . . make product performance claims or product benefit claims that the device affects health or the safety of drinking water, unless the device has been certified by the State Department of Health Services pursuant to Article 3 (commencing with Section 116825) of Chapter 5 of Part 12 of Division 104 of the Health and Safety Code. . . ..

Section 116835 of the California Health & Safety Code provides, in relevant part:

> (a) No water treatment device that makes product performance claims or product benefit claims that the device affects health or the safety of drinking water, shall be sold or otherwise distributed that has not been certified by the department or by another entity in accordance with subdivision (b). Water treatment devices not offered for sale or distribution based on claims of improvement in the healthfulness of drinking water need not be certified pursuant to this section.

Additional applicable provisions of the California Business & Professions Code and Health & Safety Code are set forth in pages A36-A40 of the Petitioner's Appendix.

The applicable provisions of Article I, section 8, clause 3 and the First Amendment of the United

States Constitution are set forth on page 36 of the Petitioner's Appendix.

The California Department of Health Services' Drinking Water Program also has prepared written guidelines for its enforcement of the applicable law with respect to Internet website advertising. These guidelines, which were admitted as evidence at trial and were part of the record on appeal below, are set forth in pages 41-45 of the Petitioner's Appendix.

STATEMENT

A. California's Water Treatment Devices Law

In 1991 the State of California enacted a law to regulate the advertising of water treatment devices.[1] The stated purpose of the law is to protect California consumers of these devices from false and misleading advertising. Cal. Bus. & Prof. Code §17577. The law, among other things, prohibits the making by any seller or manufacturer of such devices from making "product performance claims" and "product benefit claims" that the devices affect the health or safety of drinking water if the devices have not been certified by the State of California. Cal. Bus. & Prof. Code §17577.2; Cal. Health & Safety Code §116835; *see* Pet. App. A36-A40.

Pursuant to regulation, the California Department of Health Services (DHS), which has the authority to enforce the Water Treatment Devices Law, considers a "health claim" to be any claim that a water treatment device reduces or removes from the water an organic, inorganic or microbiological

[1] For purposes of convenience these laws shall be referred to collectively as the "Water Treatment Devices Law."

contaminant, as defined by (1) the State primary drinking water standards from the Health and Safety Code; or (2) the national primary drinking water standards from the federal Safe Drinking Water Act; or (3) Environmental Protection Agency standards. *See* Cal. Health & Safety Code, § 116830; tit. 22, Cal. Code Regs., § 60401; Pet. App. A36-40.

B. California's Regulatory Proceeding Against PuriTec, LLC

PuriTec is a Nevada company that sells water treatment devices internationally, including to California consumers. PuriTec's primary method of advertising is its Internet website. Pet. App. A16.

In response to a consumer complaint in August 2002, DHS examined PuriTec's website and determined that the company was making health claims as to several uncertified water treatment devices. Pet. App. A16. On October 22, 2002, DHS sent a written notice to PuriTec that it had violated section 116835 of the Health & Safety Code and section 17577.2 of the Business & Professions Code. Pet. App. A16-17; A41-43.

After DHS sent its notice of violation, PuriTec corresponded with DHS and made changes to its website, modifying it so that California consumers would be directed to a special part of the site, where (according to the findings of the Trial Court Below) "claims were toned down, but not removed, and where, by hyperlinks and other means, California consumers had access to claims made on Puritec's rest-of-the-world (ROW) website and, indirectly on other sites that Puritec's website linked to, that the devices did affect the health or safety of drinking water." Pet. App. A6.

C. The Underlying Litigation

Nearly a year later, on October 2, 2003, the State of California filed a complaint against PuriTec and two of its principals (both of whom subsequently were dismissed) for civil penalties and injunctive and equitable relief. Pet. App. A17. The complaint alleged that PuriTec had violated Health and Safety Code section 116835, subdivision (a), and Business and Professions Code section 17577.2, subdivision (c), by making performance- and benefit-related health claims for uncertified water treatment devices on its website, and that this activity also constituted unfair competition under Business and Professions Code section 17200. The complaint sought civil penalties and injunctive relief. Pet. App. A17.

PuriTec answered and cross-complained, contending, among other things, that Health and Safety Code section 116835, subdivision (a), and Business and Professions Code section 17577.2, subdivision (c), both on their face and as applied to regulation of PuriTec's website advertising, violated the federal Constitution's dormant commerce clause and First Amendment. Pet. App. A17.

In a bench trial, the trial court granted judgment for the State and against PuriTec on its cross claims on January 27, 2006. Pet. App. A1-13. The court imposed civil penalties against PuriTec and ordered PuriTec to make changes to its website. Pet. App. A11-13; A17.

PuriTec timely filed its notice of appeal on March 21, 2006, contending that the Trial Court committed error in ruling that the Water Treatment Devices Law, on its face and as applied to PuriTec's website advertising, did not violate the First Amendment and Dormant Commerce Clause. The Court of Appeal filed its opinion affirming the Trial

Court judgment on August 7, 2007. Pet. App. A14.

PuriTec filed a petition for review in the California Supreme Court, again asserting that the Trial Court and Court of Appeal committed error in ruling against its Constitutional defenses and cross-claims, on September 17, 2007. On November 28, 2007, the California Supreme Court filed its decision denying PuriTec's petition for review. Pet. App. A35.

REASONS FOR GRANTING THE PETITION

This case presents compelling issues of national and Constitutional importance: the federal Constitutional limits on states' authority to regulate the content of Internet websites owned by parties located outside the states' borders. Since Internet website advertising is, by its nature, a form of interstate commerce, courts have recognized that the Dormant Commerce Clause of Article I, section 8 of the United States Constitution places certain limits on a state's ability to regulate website content. The Free Speech Clause of the First Amendment also limits the ability to regulate website content. But the Circuit Courts currently are split on the extent to which states can regulate the Internet.

In this case, the California Court of Appeal erred in holding that the State of California can impose civil penalties against an out-of-state manufacturer of consumer products for statements made on its website, notwithstanding that those statements were neither inherently misleading nor directed specifically at California consumers. Its decision necessarily places an undue burden on PuriTec's interstate commerce, *i.e.*, its website advertising, and presents a substantial risk of subjecting nonresident website owners to disparate

and conflicting state regulations. It also imposes an unreasonable and excessive burden on a website owner's Free Speech rights. The Court of Appeal's decision conflicts, as well, with the decisions of the Second, Fourth, Sixth, and Tenth Circuits. By granting this petition and reversing the Court of Appeal's legal error, the Court can establish a uniform, constitutional approach to the states' ability to regulate Internet commerce.

A. State Regulation of Out-Of-State Website Content That Is Neither Inherently False Nor Targeted Specifically At That State's Citizens Directly And Unconstitutionally Burdens Interstate Commerce.

1. The Dormant Commerce Clause Limits The Ability Of States To Regulate Interstate Commerce.

The Commerce Clause provides, "Congress shall have power . . . [t]o regulate commerce . . . among the several states . . . ." U.S. Constitution, art. I, §8, cl. 3. This clause "encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute,* 491 U.S. 324, 326 (1989). This implicit doctrine, known as the "Dormant Commerce Clause", "precludes state regulation in certain areas 'even absent congressional action.'" *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 87 (1987). State laws that intrude upon the federal government's exclusive authority to regulate interstate commerce are invalid under the Dormant Commerce Clause. *Healy* , 491 U.S. 326 (1989).

The level of scrutiny that applies to state regulations that affect interstate commerce depends

upon the manner in which they affect interstate commerce. This Court has held that state laws that *directly* regulate interstate commerce are subject to strict scrutiny and are nearly always invalid. *See Healy v. The Beer Institute*, 491 U.S. 324, 336-37 (1989) (beer price regulations found both discriminatory and directly burdensome on interstate commerce). The Court also has invalidated laws that do not discriminate against or directly regulate interstate commerce but *indirectly* burden it. Such laws are subject to a balancing test that weighs the importance of the state interest against the burden imposed on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

2. State Regulations On Internet Content Burden Interstate Commerce In Violation Of The Dormant Commerce Clause.

The United States Supreme Court has recognized that the "Internet is a unique and wholly new medium of worldwide human communication." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997). States have responded to this new medium with new laws and regulations, which have invited challenges on the ground that they violate the Dormant Commerce Clause. Several federal circuits to date have struck down state laws that purport to regulate the content of Internet websites where the regulations have the practical effect of regulating interstate commerce. *See PsiNet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003); *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827

(E.D. Mich. 2001); *American Libraries Ass'n v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997).

Internet website advertising is a form of interstate commerce that is particularly unsuitable for state regulation. The reason is simple: website pages may be accessed by anyone, anywhere who has an Internet connection. When a state attempts to dictate how a company may advertise its products on its website, the practical effect is that it dictates how the website advertises not only to that state's citizens but to the citizens of other states as well. The website owner can try to avoid liability under state law in one of two ways. Conform its entire website to the dictates of the regulating state, thereby depriving citizens of other states of communications and information that those other states may allow. The other response is to try to create a special part of its website just for the citizens of the regulating state. Either response entails a significant burden to interstate commerce.

The Fourth Circuit, among other courts, recognized this problem in *PsiNet, Inc. v. Chapman,* 362 F.3d 227 (4th Cir. 2004). The Circuit struck down a Virginia statute that criminalized the dissemination of material "harmful to minors" over the Internet. The Fourth Circuit upheld summary judgment against the state on both first amendment and Dormant Commerce Clause grounds. In reaching its decision, the court reasoned as follows:

> Courts have struck down state statutes similar to Virginia Code section 18.2-391 as unduly burdensome on interstate commerce because they, in effect, restrict commercial electronic materials in all states, not just the state in which the statute was enacted. For example, in *American Libraries Ass'n v*

> *Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997), the District Court found that because there was no effective way to limit access to online materials by geographic location, a Web site owner operating legally in California would have to comply with New York's law to avoid being subject to liability there. *Id.* at 174. This may deter the California Web site from placing its material on the Internet, thereby affecting legitimate commerce outside of New York. At the least, the California Web site would have to incur the expense of complying with New York's law if it were willing to post the materials at all (because materials accessible online in California are equally accessible online in New York).

362 F.3d at 239. Applying this analysis, the Fourth Circuit found that the statute directly regulated interstate commerce and failed to survive the strict scrutiny applied to such statutes. Although it conceded that Virginia had a "compelling interest in protecting the physical and psychological well-being of minors", it held that the statute did not legitimately serve that purpose, for several reasons. First, to the extent the statute applied to communications and electronic displays outside the state of Virginia, it was an impermissible regulation on interstate commerce. To the extent it regulated only intrastate Internet communications, it did not serve its stated purpose because minors could still access out of state material. *Id.* at 240.

The Fourth Circuit also held that, even if the more relaxed balancing test of *Pike Church* was applied, the statute would not survive, because the burden on interstate commerce outweighed the local benefits of the statute. *Id.* at 239-240; *see also*

American Booksellers Foundation v. Dean, 342 F.3d 96 (2d Cir. 2003) (striking down state regulation of transmission of material "harmful to minors" over the Internet as violation of first amendment and dormant commerce clause).

In contrast to these decisions, a few federal circuits have taken a more permissive approach to state regulation of the Internet. In. *Beyond Sys. v. Keynetics, Inc.,* 422 F.Supp.2d 523 (D.Md.2006), the district court upheld, against a Commerce Clause challenge, a state statute that protected Maryland residents from electronic mail spam. *Id.* at 536. In *National Federation of the Blind v. Target Corp.,* 452 F.Supp.2d 946 (N.D.Cal.2006), the Northern District of California held that a claim under California's Disabled Persons Act act could be stated against Target, a national retailer, on the ground that its website was not accessible to the blind. *Id.* at 964. The court in that decision specifically criticized the analysis followed by the Southern District of New York in *American Libraries Ass'n v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997) and declined to follow it. *Id.* at 961. The court refused to dismiss the plaintiff's claim because it could not say, at that stage of the case, what the practical effect of imposing disability access requirements on Target's website would be. *Id.* at 962.

3. The California Court Erred In Upholding A State Regulation On Website Content That Directly And Excessively Burdens Interstate Commerce.

The Trial Court below, and the Court of Appeal that affirmed the Trial Court's judgment in its opinion, *see People ex rel Brown v. PuriTec,* 153 Cal. App. 4th 1524, 64 Cal. Rptr. 3d 270 (2007), departed

sharply from the approach taken by the majority of the federal circuits when it upholds the application of the Water Treatment Devices Law to website content. In upholding the judgment, the Court of Appeal erred for several reasons.

First, the Court attempted, but failed, to distinguish the *Pataki* and *PsiNet* line of decisions finding state regulations of Internet content to violate the Dormant Commerce Clause. The Court of Appeal offered four reasons why this case is different from those cases, but each is unavailing. First, it argued that in those cases the statutes sought to regulate "the Internet itself," while in this case the statutes in question only seek to regulate "misleading advertising on the Internet regarding specifically identified commercial products." Pet. App. A24. This is a distinction without a difference; in this case as in those the regulation in question is a direct regulation on Internet content. The logic there applies here as well.

Second, the Court of Appeal argued the *PsiNet-Pataki* cases were inapplicable because of the "one-track mind of the statutes in these federal cases – criminalizing the Internet dissemination of sexually explicit material harmful to minors . . .." Pet. App. A24. Again, the Court of Appeal makes no attempt to explain why this fact is significant. PuriTec concedes that in both the *PsiNet* line of cases and in this case the States sought to further legitimate state interests. For Dormant Commerce Clause purposes the differences in those interests are immaterial. What matters is the burden on interstate commerce, which is just as significant for the vendor in this case as for the vendors in the *PsiNet* cases.

Third, the Court plainly errs when it attempts to distinguish the *PsiNet* cases on the ground that PuriTec "targeted its website advertising at

California consumers." Pet. App. A24. The Trial Court, however (in a finding not overturned on appeal), found that PuriTec's website advertising violated the Water Treatment Devices Law between December 7, 2000 and September 30, 2003, although PuriTec did not attempt to create a California-specific portion of its website until 2003, after DHS sent its notice of violation. Pet. App. A6. PuriTec's liability in this case is predicated primarily, if not entirely, on website content that was not directed at any state in particular, even if the both the Court of Appeal's and Trial Court's opinions leave this point muddled. In fact, California's attempt to regulate PuriTec's website presents exactly the same problem as in the *Pataki-PsiNet* cases: that effectively regulating how a website addresses *California* consumers necessarily will regulate how it addresses *all* of its consumers.

Fourth, and finally, the Court of Appeal argues that "while the display of sexual material over the Internet cannot be geographically isolated, the display of health and safety claims of water treatment devices over the Internet can be." Pet. App. A24. Obviously, that is not so. The technical ability to control how a website appears to consumers in different geographic markets does not depend on what kind of content the website offers. This argument is fallacious.

A second reason why the Courts below erred is in failing to consider the extent to which imposing California's water treatment device advertising laws to out-of-state websites creates the real and substantial risk that websites will be subjected to multiple and conflicting state regulations. The risk that a party's commerce will be exposed to conflicting state regulations is an important factor in determining whether a state regulation excessively

burdens interstate commerce. *See Healey*, 491 U.S. at 336 (court must consider "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation"). A regime of conflicting state requirements on what a website may and may not say about products advertised on the website would not only be difficult, if not impossible, strictly to comply with, it would be self-defeating, because Internet consumers invariably would be exposed to conflicting advertising statements about the same products.

Finally, the opinions below warrant review because they leave existing Dormant Commerce Clause doctrine in the area of website advertising hopelessly muddled. The Trial Court's opinion contradicts itself. On the one hand, the Trial Court acknowledged the state's lack of authority to regulate a website that is *not* specifically targeted at California residents:

> The State of California may not regulate the content of the rest-of-the-world website even if it is possible or even likely that a California resident can access the [rest of the world] website. California may protect its residents by means far less intrusive than attempting to completely shield them from the ROW website or punishing a seller's speech on the ROW website. The focus must be on the sales in California.

Pet. App. A9. On the other hand, the Court also found that PuriTec violated the Water Treatment Devices Law before it created a section of its website targeted at California consumers, and it found that

PuriTec violated the law because consumers could link from its site to other sites where "health claims" were made. Pet App. A9. The state of the law is doubly confusing because DHS's own guidelines conflict with the Court's opinion and actually forbid a website owner from maintaining a California-targeted website that complies with California law and a non-California website that does not. Pet App. A44-45.

The opinions below, in short, do not square with the majority of federal circuits that hold that state regulations of Internet content violate the Dormant Commerce Clause. The opinions below warrant review and reversal.

B. State Regulation of Website Content That Is Neither Inherently Misleading Nor Targeted At The State Infringes the Website Vendor's Commercial Free Speech Rights Under the First Amendment Of The United States Constitution.

1. Regulation of Commercial Speech: The *Central Hudson* Test

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980), the United States Supreme Court held that the right of free speech under the First Amendment of the United States Constitution encompasses commercial speech. *Id.* at 564. The Court in *Central Hudson* set forth a four-part analysis to determine whether state regulations on commercial speech are valid:

> In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is

> protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Id. at 566; *see Nike, Inc. v. Kasky*, 27 Cal. 4th 939, 952 (2002) (quoting *Central Hudson*). If a regulation of commercial speech fails the *Central Hudson* test, it is invalid under the First Amendment. *Id.*

2. The State's Attempt To Regulate Non-California Based Website Advertising Fails The *Central Hudson* Test For Regulation of Commercial Speech.

At trial PuriTec argued that the State's application of the Water Treatment Devices Law to its website advertising infringed its commercial free speech rights under the four-part *Central Hudson* test.

First, the speech that is regulated by this law is not inherently misleading, and is therefore protected under *Central Hudson* unless the State can satisfy the remaining three parts of the test. Although the stated goal of these statutes is to protect California consumers from false statements about water treatment devices, the two operative statutes – Business and Professions Code section 17577.2(c) and Health and Safety Code section 116835 – do not regulate inherently false or deceptive speech.

Instead, they regulate the making of "product performance claims" and "product benefit claims" about uncertified water treatment devices, *regardless of whether the claims are false or not.* Cal. Business & Prof. Code §17577.2(c); Cal. Health & Safety Code §116835. The language of section 17577.2(c), in particular, makes this clear, in that it penalizes those who:

> *Notwithstanding subdivision (a),* make product performance claims or product benefit claims that the device affects health or the safety of drinking water, unless the device has been certified by the State Department of Health Services . . . .

Cal. Bus. & Prof. Code §17577.2 (emphasis added). Under these two statutes, the State can penalize a website owner for making claims about water treatment devices that are *completely true and accurate.*

PuriTec does not dispute that the protection of California consumers from untrue and misleading statements is a substantial and legitimate interest of the State of California. The issue, therefore, is whether the last two prongs of the test are satisfied.

At trial and on appeal, PuriTec argued that the State failed to demonstrate that the Water Treatment Devices Law advances the goal of protecting California consumers from false information because the law applies equally to true and false statements. The Court of Appeal disagreed, reasoning that "the two statutes directly advance this interest by ensuring that health claims for water treatment devices are truthful." Pet. App. A32. The Court of Appeal explained, first, that the certification process "is a test of truth", and, second,

that the statute aids the protection of consumers from misleading statement by requiring use of a disclaimer against making health claims by PuriTec at the point of sale on its website for California consumers California purchasers. Pet. App. A32. But the Court of Appeal never explains why a disclaimer would work in this case. In fact, it is irrational to suppose that it would. The Court of Appeal conceded that it cannot regulate the "rest-of-the-world" website (which therefore will contain so-called "health claims" otherwise barred by California law), and it conceded that it cannot absolutely prevent California consumers from viewing those health claims. Requiring a disclaimer will merely cause confusion among consumers, because it will contradict the content of the rest-of-the-world website, which (according to the Court) may contain health claims. Requiring PuriTec to contradict itself cannot possibly advance the cause of protecting California consumers from falsehood.

Finally, PuriTec argued at trial that the State's attempt to regulate website advertising also fails the fourth prong of the *Central Hudson* test because it is much more "extensive than necessary to further" the State's interest in protecting California consumers from false and misleading advertising. *See* 447 U.S. at 569-570. As explained above, the law regulates truthful advertisers as well as untruthful ones, and the United States Supreme Court has said that advertising regulations that punish truthful speech are less likely to meet the fourth prong of the *Central Hudson* test. *See Llorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 562-63. This law is more extensive than it has to be in several respects. First, it imposes heavy and expensive certification burdens on website vendors of water treatment devices. Second, it will have the probable practical effect of

forcing out-of-state website vendors to change their non-California as well as California websites. Third, it regulates vendors who sell only a small portion of their products to California. Finally, the range of "statements" that the State (supported by the trial court and Court of Appeal) consider as actionable "health claims" is extremely broad, and includes such things as mere hypertext links to other websites that make "health claims." The Court of Appeal ignored all of these arguments. Pet. App. A32-34.

In short, the Water Treatment Devices Law does not directly further its stated purpose of protecting California consumers from false advertising about these devices, and it is much more extensive and burdensome than it needs to be to serve its legitimate purpose. It does not satisfy the third or fourth prongs of *Central Hudson* and is therefore unconstitutional under the First Amendment of the United States Constitution. By relying upon the requirement of a disclaimer of health claims, the Court of Appeal adopts a solution that neither conforms to the words of the statute nor advances the cause of protecting California consumers from misleading statements. Review by this Court would settle important questions relating to the State's ability to regulate website content consistent with the limits of the First Amendment.

C. The Regulation Of "Health Claims" In The Water Treatment Devices Law Is Facially Invalid Under The First Amendment Because It Is Unconstitutionally Vague.

At trial PuriTec argued that the Water Treatment Devices Law violates the First Amendment of the United States Constitution because it is unconstitutionally vague. A statute is

unconstitutionally vague if it "fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *ACLU v. Miller*, 977 F. Supp. 1228, 1234 (N.D. Ga. 1997) (quoting *Kolender v. Lawson* 461 U.S. 352, 357(1983)). "[T]he policies underlying the vagueness rule apply with special force where the statute at issue restricts speech." *Miller*, 977 F. Supp. at 1234 (citing *ACLU v. Reno*, 929 F. Supp. 824, 860 (E.D. Pa. 1996)). In *Miller*, the court found the ban on using false names in Internet transmissions was unconstitutionally vague because it (1) did not give fair notice of the scope of conduct it proscribed; (2) created a risk of arbitrary enforcement; and (3) chilled and infringed upon the party's free expression. *Id.* at 1234. As PuriTec argued below, those same factors are present here, rendering this statute as unconstitutionally vague as the one in *Miller*.

First, the statute on its face fails to give fair notice of the proscribed activities because of its failure to define key terms. The Water Treatment Devices Law purports to prevent vendors from making "product performance claims and product benefit claims that the device affects health or the safety of drinking water" about uncertified devices, but it does not define those terms. Pet. App. A36-40. This lack of clarity is evident in the Trial Court's statement of decision, which found PuriTec to have violated the law merely because it placed links on its site to other websites where claims about the devices were made. Pet. App. A6. The Trial Court's opinion highlights why the statute creates a significant risk of arbitrary enforcement, because the extremely vague terms "product performance claims" and

"product benefit claims" are likely to be interpreted differently in different cases.

Third and finally, there is a significant risk that the statute will chill legitimate commercial speech because there is no requirement that the regulated speech be inherently misleading. To avoid the risk of liability under this statute, sellers of water treatment devices must scale back the statements they can make about their devices that consumers may be deprived of useful, legitimate information about them.

The only response of the Court of Appeal to the vagueness argument is that PuriTec cannot claim the law is vague because its owner, James Mead, "effectively conceded at trial that it was clear how PuriTec was to comply with the California certification law." Pet. App. A33. Since a challenge to a statute on grounds of vagueness is a challenge over a law's legality rather than a dispute of fact, however, Mr. Mead's testimony is irrelevant to the question of vagueness under the Constitution. The question is not whether Mr. Mead understood the law but whether the law, in general, is so vague that it gives rise to the problems described in *Miller*. By foreclosing PuriTec from arguing that the statute is vague, the Court committed error.

Because of the inherent vagueness of the statute, it is facially invalid under the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

I. Trial Court Judgment

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

PURITEC; JAMES E. MEAD; I. M. MEAD and DOES 1 through 25, inclusive,

Defendants.

No. 03AS05498

JUDGMENT

This case having come on regularly for trial before this court, the court having considered all testimony, evidence, and oral and written arguments of the parties, and the court having taken the matter under submission and having issued its Statement of Decision,

It is hereby ordered, adjudged and decreed as follows:

The court's Statement of Decision, attached as Exhibit A and incorporated herein by reference, shall be the final ruling of the court, and judgment is hereby entered in favor of the People and against defendant Puritec as to each of the causes of action

set forth in the complaint, and the court rules against defendant Puritec on its cross-complaint.

It is so ordered.

DATED: January 27, 2006

Rudolph R. Loncke
Assigned Judge of the Superior Court, Retired

II. Trial Court Statement of Decision

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

PURITEC; JAMES E. MEAD; I. M. MEAD and DOES 1 through 25, inclusive,

Defendants.

No. 03AS05498

STATEMENT OF DECISION

This action came on regularly for trial on March 22, 2005, in Department 47 of this court, the Honorable Rudolph R. Loncke, Assigned Judge of the Superior Court, Retired, presiding without a jury, and was tried on that date and on March 23 and 24, 2005, and on June 6 and 7, 2005. Deputy Attorney General Roy S. Liebman appeared as counsel for plaintiff, and Stephen L. Davis, Esq., appeared as counsel for defendants.

Oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The court, having considered the evidence and the arguments, both oral and written, of counsel and being fully advised, issues the following statement of decision:

PARTIES

1. Plaintiff is the People of the State of California, by and through the Attorney General, Bill Lockyer, on behalf of the State Department of Health Services (DHS).

2. Defendant Puritec LLC (Puritec) is a Nevada limited liability company that has its principal place of business in Las Vegas, Nevada, and conducts its business almost exclusively over the Internet.

MATTERS DECIDED

A. The Unfair Competition Law.

3. Chapter 5 of part 2 of division 7 of the Business and Professions Code (commencing with section 17200) is commonly known as the unfair competition law (UCL). This section provides, in part, that:

> As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by chapter 1 (commencing with section 17500) of part 3 of division 7 of the Business and Professions Code.

Section 17200 goes beyond anticompetitive business practices to encompass the public's right to protection from unlawful conduct. Because the statute imposes strict liability, it is not necessary to show that the defendant intended to injure anyone.

4. Article 6 (commencing with section 17577) of chapter 1 of part 3 of division 7 of the Business and Professions Code deals specifically with water treatment devices. Section 17577, subsection (c), contains a legislative finding that:

> The legislature further finds and declares that the protection of homeowners and consumers from untrue and misleading statements and from unfair dealings is of the utmost importance.

Section 17577.2 defines unlawful activities in connection with the sale, lease, rental, or offer for sale of water treatment devices and subdivision (c) of the statute provides, in pertinent part, that it is unlawful to:

> make product performance claims or product benefit claims that the device affects the health or the safety or drinking water, unless the device has been certified by the State Department of Health Services....

5. Article 3 (commencing with section 116825) of chapter 5, part 12 of division 104 of the Health and Safety Code authorizes DHS to set forth the criteria and procedures for certification of water treatment devices that are claimed to affect the health or safety of drinking water. Section 116835, subdivision (a), provides, in part, that:

> No water treatment device that makes product performance claims or product benefit claims that the device affects the health or the safety of drinking water, shall be sold or otherwise distributed that has not been certified by the

Department or by another entity in accordance with subdivision (b).

6. Between December 7, 2000, and September 30, 2003, Puritec engaged in unfair competition as previously defined, and violated Health and Safety Code section 11635, subdivision (a), by making claims on its Internet website to California consumers that certain of its water treatment devices affect the health or safety of drinking water when Puritec knew that such devices were not certified by DHS. California residents who purchased these uncertified devices could not reach the order page (point of sale) for the given devices without first going through the web page or pages containing or linking to the prohibited claims for the device.

7. Puritec made minimal efforts to comply with the above-cited laws after DHS began its investigation. Puritec established a separate Internet site for California customers where claims were toned down, but not removed, and where, by hyperlinks and other means, California consumers had access to claims made on Puritec's rest-of-the-world (ROW) website and, indirectly on other sites that Puritec's website linked to, that the devices did affect the health or safety of drinking water. On multiple occasions, between December 7, 2000, and September 30, 2003, DHS staff directly contacted defendant Mead and his wife and informed them as to how their website was specifically violating California law, and what Puritec could do to bring its website into compliance. Notwithstanding these warnings, Puritec failed and refused to bring its website into compliance with California law.

8. Based on the above, the court finds for the People and against Puritec as to each of the causes of action set forth in the complaint, and assesses civil penalties and equitable relief consistent with its findings.

9. Defendant Puritec filed a cross-complaint for declaratory relief. The basis of this cross-complaint was that the State's complaint infringed on Puritec's rights under the First Amendment of the United States Constitution (commercial free speech), and was in excess of the State's power and jurisdiction under the dormant Commerce Clause of the United States Constitution. The court rejects these arguments and rules against Puritec on its cross-complaint. While the State may not regulate commercial speech beyond its borders, it may properly regulate such speech directed at its residents in order to prevent consumer deception. Because the State has the authority to regulate commercial transactions to prevent harm to the consumer, it similarly has the authority to regulate the speech connected to these transactions. As to the dormant Commerce Clause of the United States Constitution, absent conflicting federal legislation, states retain their authority under their general police powers to regulate matters of legitimate local concern, even if interstate commerce may be affected. In sum, the court repeats that the State's interests in the instant action do not violate the First Amendment of the United States Constitution regarding commercial free speech, and do not impose an excessive burden on interstate commerce in relation to the punitive local benefits.

B. Validity of California Law

10. Defendants have challenged the validity of Health and Safety Code section 116835, subdivision (a), and Business and Professions Code section 17577.2. The court finds that these sections are valid exercises of legislative authority conferred on DHS to protect California consumers, and that such authority can be properly exercised to protect California consumers when sales are made over the Internet by foreign entities having no additional contacts with California other than advertising and selling water treatment devices in California over the Internet.

11. Defendants' claims that Health and Safety Code section 116835, subdivision (a), and Business and Professions Code section 17577.2 are impermissibly broad when applied to Internet sales are without merit. Because the technology exists to separate the California website from the ROW website established by a company such as Puritec, it is not a burden on interstate commerce for DHS to regulate what can be said about water purification products to California residents. Puritec could and can easily structure its websites to inform California customers at the point of sale (the "check out" page of the website) that its devices are not certified by the State of California, and that no health or safety claims relative to drinking water can be made under California law about Puritec's devices. All this can be accomplished without interfering with Puritec's sales of its devices to non-California customers.

C. Injunctive and Equitable Relief

12. Business and Professions Code sections 17203 and 17535 provide the court with authority to grant the People injunctive relief in this case. Section

17203 is a component statute of the UCL and authorizes the court to enjoin any person who engages, has engaged, or proposes to engage in unfair competition. Section 17535 is targeted at false or misleading advertising representations to the public, and also authorizes the court to enjoin any person, corporation or other association from `violating chapter 1 of part 3 of division 7 of the Business and Professions Code that includes section 17577.2.

The State of California may not regulate the content of the rest-of-the-world website even if it is possible or even likely that a California resident can access the ROW website. California may protect its residents by means far less intrusive than attempting to completely shield them from the ROW website or punishing a seller's speech on the ROW website. The focus must be on the sales in California.

13. Pursuant to Business and Professions Code sections 17203 and 17535, the court hereby enjoins and restrains defendant Puritec from making product performance claims and product benefit claims on its California website, either directly or indirectly or by hyperlinks to other websites, that their devices affect health or safety of drinking water, in connection with the sale or offer of sale of said devices to California residents, when such devices have not been certified by the State pursuant to article 3 (commencing with section 116825) of chapter 5 of part 12 of division 104 of the Health and Safety Code.

14. The court finds that specific warnings on the separate Puritec California website, along with strong warnings at the point of sale for devices being

shipped to California residents would: (a) provide California consumers with protection from uncertified and unauthorized health claims related to the effect of Puritec's devices on drinking water; (b) enable DHS to exercise its enforcement power effectively; and, (c) avoid undue influence on interstate commerce and Puritec's First Amendment commercial free speech interests.

15. Therefore, as a condition to Puritec's future Internet sales of uncertified devices to California residents, the court orders that Puritec maintain a separate California website that specifies its devices have not been certified by the DHS. On the California website, Puritec must specifically disclaim, conspicuously on each page, that any representation is being made directly or indirectly that its uncertified devices affect health or safety of drinking water. Puritec shall insure that a California resident while in California may not purchase a Puritec device through the ROW website.

16. At the point of sale for any device being shipped to a California resident, prior to the payment or obligation for payment of any sums for uncertified devices, the purchaser must agree by an affirmative entry on the web page constituting the point of sale that he or she has not been informed directly or indirectly by Puritec or its agents that the water treatment device affects health or safety of drinking water. The purchaser must also be informed that the DHS and the Attorney General of the State of California considers any such claims about uncertified water treatment devices to be illegal under California law. These requirements shall be conspicuous, separate from, and in addition to the requirements of Civil Code section 1689.7.

17. In connection with past sales of water treatment devices to California residents, the court hereby orders Puritec as follows: (a) to use reasonable efforts to notify past California purchasers by mail of the opportunity to obtain a partial refund of the purchase price of water treatment devices purchased from Puritec after December 7, 2000, and up to the date of judgment in this action; (b) to offer and to pay refunds of 20% of the purchase price to any purchaser who asserts reliance on claims by Puritec, directly or indirectly, that the device purchased would affect the health or safety of drinking water; and, (c) notify DHS of the details and results of Puritec's compliance with this order. The notification to consumers shall be sent out no later than forty-five (45) days from the date of judgment and Puritec shall complete processing all refunds within ninety (90) days from the date of judgment. Ten (10) days after all refunds have been processed, Puritec shall notify DHS of the details and results of their compliance with court-ordered refunds.

18. In connection with the refund offer, Puritec must provide notice that the devices have not been certified by the DHS and that no claim should have been made, directly or indirectly, that the product had any effect on the health or safety of drinking water. In addition, the notice to the purchaser should specify that the offer for refund is being made as a result of litigation commenced by the Attorney General of the State of California to protect California consumers from unlawful claims that the uncertified water treatment devices affect the health or safety of drinking water. The form of the notice shall be subject to reasonable prior approval of the

DHS before it is sent out to past California purchasers of Puritec's water treatment devices.

D. Civil Penalties

19. The acts and omissions of defendant Puritec invoke civil penalties under three separate and distinct statutes: Business and Professions Code sections 17206 and 17536, and Health and Safety Code section 116840. Business and Professions Code section 17206 is a component statute of the UCL, and provides, in part, that any person who is engaged in unfair competition shall be liable for a civil penalty not to exceed $2,500 for each violation of the chapter. Business and Professions Code section 17536 provides a remedy separate and distinct from section 17206, and deals more specifically with advertising representations (or misrepresentations) made to the public. Section 17536, subdivision (b), contains wording substantially similar to section 17206, subdivision (b), regarding the court's imposition of civil penalties for each violation of the chapter. Health and Safety Code section 116840 provides for the assessment of civil penalties relating to the misrepresentation of water treatment devices, and is a remedy separate and distinct from Business and Professions Code sections 17206 and 17536. Health and Safety Code 116840, subdivision (c) provides for a civil penalty not to exceed $5,000 for each violation relating to misrepresentations of water treatment devices.

20. Pursuant to Business and Professions Code sections 17206 and 17536, and Health and Safety Code section 116840, the court assesses on defendant Puritec a civil penalty of $21,275 amounting to 20% of the costs to California consumers of each device

sold by Puritec during the relevant time period in violation of California law. In assessing the civil penalty against Puritec, the court considered the People's request for a penalty equal to the total amount of the subject sales, i.e., $106,372.80. Because of the relative novelty of the internet sales issue and the fact that Puritec made some effort to comply with California law, the court rejects the confiscatory request of the People. In arriving at the 20% figure, the court considered Puritec's efforts to establish a California website, the relatively low number of sales to California purchasers, the nature of the health claims that were made, and the fact that uncertified devices may be legally sold in California as long as health claims are not made for said devices in connection with their sale. The civil penalties assessed, when coupled with the equitable relief granted, are calculated to take the profit out of Puritec's noncompliance with California law.

21. Judgment shall accordingly be entered in favor of plaintiff, People of the State of California, and against defendant Puritec in accordance with this statement of decision.

DATED: January 27, 2006

Rudolph R. Loncke
Assigned Judge of the Superior Court, Retired

III. Court of Appeal Opinion

(reported as *People ex rel Brown v. PuriTec*, 153 Cal. App. 4th 1524, 64 Cal. Rptr. 3d 270 (2007)).

Court of Appeal, Third District, California.

The PEOPLE ex rel. Edmund G. BROWN, JR., as Attorney General, etc.,

Plaintiff, Cross-Defendant and Respondent,

v.

PURITEC, Defendant,

Cross-Complainant and Appellant.

No. C052167.

Aug. 7, 2007.
As Modified Aug. 15, 2007.
Review Denied Nov. 28, 2007.

Background: State brought action against Nevada company that sold water treatment devices to California consumers, alleging company violated statutes by making performance- and benefit-related health claims for uncertified water treatment devices on its website, and that this activity constituted unfair competition. Company cross-complained, alleging statutes were unconstitutional as applied. After bench trial, the Superior Court, Sacramento County, No. 03AS05498,Rudolph Loncke, J., granted judgment for State, imposed civil penalties against company, and ordered company to make changes to its website. Company appealed.

Holdings: The Court of Appeal, Davis, Acting P.J., held that:

(1) statutes did not violate dormant commerce clause under first-tier approach;

(2) statutes did not violate dormant commerce clause under second-tier approach; and

(3) statutes did not violate First Amendment.

Affirmed.

Davis & Leonard, Sacramento, and Stephen L. Davis for Defendant, Cross-Complainant and Appellant.
Edmund G. Brown, Jr., Attorney General, Joseph O. Egan and Roy S. Liebman, Deputy Attorneys General, for Plaintiff, Cross-Defendant and Respondent.
DAVIS, Acting P.J.

California has two statutes that prohibit the seller of a water treatment device from making performance or benefit claims that the device affects health or the safety of drinking water, unless the device has been certified by the state Department of Health Services: Health and Safety Code section 116835, subdivision (a), and Business and Professions Code section 17577.2, subdivision (c).[1]

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[1] Effective July 1, 2007, the Department of Health Services was reorganized into the Department of Health Care Services and the Department of Public Health. In this opinion, we will simply refer to the former name, Department of Health Services.

In this appeal we conclude that these two statutes do not violate the federal Constitution's dormant commerce clause or First Amendment, as applied to health claims made by defendant PuriTec, LLC (PuriTec) on its Internet website concerning uncertified water treatment devices it offers for sale to California consumers. Accordingly, we affirm the judgment.

BACKGROUND

PuriTec is a Nevada company that sells water treatment devices internationally, including to California consumers. PuriTec's primary method of advertising is its Internet website (website).

Since 1991, the State of California (the State) has required that sellers of water treatment devices (to California consumers) who make "health claims" regarding those devices have those devices certified by the Department of Health Services (DHS). Pursuant to regulation, DHS considers a "health claim" to be any claim that a water treatment device reduces or removes from the water an organic, inorganic or microbiological contaminant, as defined by (1) the State primary drinking water standards from the Health and Safety Code; or (2) the national primary drinking water standards from the federal Safe Drinking Water Act; or (3) Environmental Protection Agency standards. *See* Health & Saf.Code, § 116830; tit. 22, Cal.Code Regs., § 60401.

When DHS determines that a vendor or manufacturer is making health claims for an uncertified water treatment device, it sends a notice of violation that details prohibited conduct and requests correction within 30 days. Pursuant to a

consumer complaint in August 2002, DHS examined PuriTec's website and determined that the company was making health claims as to several uncertified water treatment devices. DHS sent PuriTec a notice of violation in October 2002. Over the following year, PuriTec assured DHS that it would change its website to comply with California law, but it dragged its feet along the way.

In October 2003, the State filed a complaint against PuriTec and its owners (James and I.M. Mead, both of whom were subsequently dismissed). The complaint alleged that PuriTec had violated Health and Safety Code section 116835, subdivision (a), and Business and Professions Code section 17577.2, subdivision (c), by making performance- and benefit-related health claims for uncertified water treatment devices on its website, and that this activity also constituted unfair competition under Business and Professions Code section 17200. The complaint sought civil penalties and injunctive relief.

PuriTec answered and cross-complained, contending, among other things, that the application of Health and Safety Code section 116835, subdivision (a), and Business and Professions Code section 17577.2, subdivision (c), to its website violated the federal Constitution's dormant commerce clause and First Amendment.[2]

In a bench trial, the trial court granted judgment for the State. The court imposed civil penalties

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[2] Based on these two constitutional provisions, PuriTec also alleged in its responsive pleadings that the two statutes at issue are unconstitutional on their face. Our conclusion that the two challenged statutes are constitutional in these respects, as applied to PuriTec, also dispenses with these facial challenges.

against PuriTec and ordered PuriTec to make changes to its website.

DISCUSSION

1. Standard of Review and Statutes at Issue

This appeal asks whether Health and Safety Code section 116835, subdivision (a) (hereafter, Health and Safety Code section 116835(a)) and Business and Professions Code section 17577.2, subdivision (c) (hereafter, Business and Professions Code section 17577.2(c)), as applied to health claims made on PuriTec's website regarding uncertified water treatment devices, are constitutional under the federal Constitution's dormant commerce clause and First Amendment. This appeal is limited to these constitutional challenges. PuriTec has not challenged in its briefing the specific form of the injunction or any other specific relief that the trial court granted, and therefore has forfeited any claims in these regards. *See Bonshire v. Thompson*, 52 Cal.App.4th 803, 808, fn. 1, 60 Cal.Rptr.2d 716 (1997).

PuriTec concedes that the essential facts are undisputed. PuriTec also concedes that it sold water treatment devices in California, and that its website contained certain statements that the State contended violated California law. As such, this appeal presents questions of law that we determine independently. *Reader's Digest Assn. v. Franchise Tax Bd.*, 94 Cal.App.4th 1240, 1245, 115 Cal.Rptr.2d 53 (2001).

Health and Safety Code section 116835(a) specifies as pertinent:

"(a) No water treatment device that makes product performance claims or product benefit claims that the device affects health or the safety of drinking water, shall be sold or otherwise distributed that has not been certified by [DHS or another applicable entity].... Water treatment devices not offered for sale or distribution based on claims of improvement in the healthfulness of drinking water need not be certified pursuant to this section."

Business and Professions Code section 17577.2(c) specifies as relevant:

"It is unlawful for any person to do any of the following in connection with the sale, lease, rental, ... or other disposition of water treatment devices: [¶] ... [¶]

"(c) ... make product performance claims or product benefit claims that the device affects health or the safety of drinking water, unless the device has been certified by the [DHS] pursuant to Article 3 (commencing with Section 116825) ... of the Health and Safety Code."

2. Dormant Commerce Clause

The federal Constitution's commerce clause grants Congress the authority "[t]o regulate commerce ... among the several states[.]" (U.S. Const., art. I, § 8, cl.3. This grant of authority to Congress also encompasses an implicit or "dormant" limitation on the authority of states to enact legislation affecting interstate commerce. *Healy v. The Beer Institute, Inc.* (1989) 491 U.S. 324, 326, fn. 1, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *Ferguson v. Friendfinders, Inc.* (2002) 94 Cal.App.4th 1255,

1261, 115 Cal.Rptr.2d 258 (2002) (*Ferguson*); *Bronco Wine Co. v. Jolly* (2005) 129 Cal.App.4th 988, 1016, 29 Cal.Rptr.3d 462(*Bronco*).)

A two-tiered approach is generally used to determine whether state legislation has violated the dormant commerce clause. *Brown-Forman Distillers v. N.Y. Liquor Auth.* (1986) 476 U.S. 573, 578-579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986); *Bronco, supra,* 129 Cal.App.4th at p. 1016, 29 Cal.Rptr.3d 462; *Ferguson, supra,* 94 Cal.App.4th at p. 1261, 115 Cal.Rptr.2d 258.

Under the first tier, which employs a strict scrutiny review, a state statute is invalid if it discriminates against interstate commerce in favor of in-state economic interests, or if its practical effect is to directly control commerce wholly outside the regulating state. (*Bronco, supra,* 129 Cal.App.4th at pp. 1016-1017, 29 Cal.Rptr.3d 462;*Ferguson, supra,* 94 Cal.App.4th at pp. 1261-1263, 115 Cal.Rptr.2d 258;*Brown-Forman, supra,* 476 U.S. at p. 579, 106 S.Ct. 2080;*Healy, supra,* 491 U.S. at p. 336, 109 S.Ct. 2491.)

Under the second tier, which is used to evaluate state legislation that does not discriminate against interstate commerce or directly control it, a balancing test is employed: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (*Pike v. Bruce Church* (1970) 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174(*Pike*);*Brown-Forman, supra,* 476 U.S. at p. 579, 106 S.Ct. 2080;

Ferguson, supra, 94 Cal.App.4th at p. 1262, 115 Cal.Rptr.2d 258.

a. First-tier approach-strict scrutiny

In applying the first-tier approach here, PuriTec does not argue, nor could it, that Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) discriminate against interstate commerce in favor of California commerce. The two statutes apply equally to in-state and out-of-state actors. *See Ferguson, supra,* 94 Cal.App.4th at p. 1262, 115 Cal.Rptr.2d 258.

Instead, under the first-tier approach, PuriTec contends that the practical effect of these two statutes is to directly control out-of-state website content because they force the seller of water treatment devices to make all of its website advertising conform to California law. In other words, these two statutes force such sellers to remove all health claims for uncertified devices from their websites because California consumers may see those claims.

We do not see the practical effect of Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) as directly controlling commerce wholly outside California. *Healy, supra,* 491 U.S. at p. 336, 109 S.Ct. 2491; *Bronco, supra,* 129 Cal.App.4th at pp. 1016-1017, 29 Cal.Rptr.3d 462; *Ferguson, supra,* 94 Cal.App.4th at pp. 1261-1262, 115 Cal.Rptr.2d 258. These two statutes directly regulate website advertising that is targeted at California consumers. If sellers of water treatment devices decide to conform all of their website advertising to California law, that is a

voluntary business decision, not a mandatory legal one. As the trial court factually found, in findings not challenged by PuriTec on appeal, "technology exists to separate [a] California website from the ROW [rest-of-the-world] website established by a company such as PuriTec ....PuriTec could and can easily structure its websites to inform California customers at the point of sale (the 'check out' page of the website) that its devices are not certified by the State of California, and that no health or safety claims relative to drinking water can be made under California law about PuriTec's devices. All this can be accomplished without interfering with PuriTec's sales of its devices to non-California customers." Any interference with out-of-state sales can also be eliminated, the State suggests, by a simple footnote on the PuriTec website that the device has not been submitted for certification in California, as required by California law, to make health or safety claims to California consumers.

PuriTec likens its position to that of the business entity in *Healy*. In *Healy*, the United States Supreme Court invalidated under the dormant commerce clause a Connecticut statute that prohibited a business entity from charging more in Connecticut than it did in three bordering states. The court concluded that the statute directly controlled commerce occurring wholly outside Connecticut because of the inevitable effect the statute would have on the prices charged by the entity in its sales in the other states. Said *Healy*: "[A] State may not adopt legislation that has the practical effect of establishing 'a scale of prices for use in other states.' " *Healy, supra*, 491 U.S. at p. 336, 109 S.Ct. 2491.

Healy is inapposite. As we have explained, Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) do not have the practical effect of establishing their health claim requirements as the law in other states for website advertising of water treatment devices. As the trial court found, a separate California website or a separate part of the general PuriTec website can be established that informs California customers that PuriTec's devices have not been certified by California and therefore no health or safety claims regarding drinking water can be made under California law about those devices.

PuriTec also seeks support in a group of federal decisions that has struck down on dormant Commerce Clause grounds state laws that purported to criminalize the dissemination of sexually explicit material harmful to minors over the Internet. *See PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003); *American Civil Liberties Union v. Johnson* (10th Cir.1999) 194 F.3d 1149; *Cyberspace Communications, Inc. v. Engler*, 142 F.Supp.2d 827 (E.D.Mich. 2001); *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997).

These federal cases, too, are inapposite. Four distinctions appear.

First, the statutes at issue in the federal cases sought to regulate the Internet itself. *See Ferguson, supra*, 94 Cal.App.4th at pp. 1264-1265, 115 Cal.Rptr.2d 258. The two statutes before us do not have such grand designs. They do not seek to regulate the Internet itself, but only misleading advertising on the Internet regarding specifically

identified commercial products.

Second, the one-track mind of the statutes in these federal cases-criminalizing the Internet dissemination of sexually explicit material harmful to minors-prompts one to question their general applicability in the dormant commerce clause arena.

Third, relying on these federal cases, PuriTec argues that a state cannot regulate Internet activity that is not located in or targeted at the state. As we have seen, PuriTec has targeted its website advertising at California consumers.

And lastly, these federal cases recognize that because there is no effective way to limit access to online materials geographically, a website owner operating legally in California, for example, would have to comply with the non-California statute at issue to avoid liability. *See PSINet, supra,* 362 F.3d at pp. 239-240 (discussing *Pataki, supra,* 969 F.Supp. at p. 174.) Consequently, the non-California statute would directly control commerce occurring wholly outside the statute's respective state jurisdiction. As we explained above, however, Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) do not directly control commerce occurring wholly outside California. Furthermore, while the display of sexual material over the Internet cannot be geographically isolated, the display of health and safety claims of water treatment devices over the Internet can be. As we have seen, PuriTec website(s) can inform California consumers that PuriTec's devices have not been certified by California and therefore no health or safety claims about those devices concerning drinking water can be made under California law.

This last point about Internet geographical ubiquity, however, raises three related points regarding the practical effect of the certification requirements of Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c).

The first point is PuriTec's argument that, given the Internet's ubiquitous geographical nature, California consumers cannot be shielded from uncertified health claims made on other portions of PuriTec's website or on another PuriTec website. Consequently, PuriTec again notes, the practical effect of Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) will force sellers of water treatment devices who advertise on the Internet to make all of their website advertising conform to California law; thus, these two statutes directly control commerce wholly outside California. We disagree.

As the trial court correctly recognized, "The State of California may not regulate the content of [PuriTec's] rest-of-the-world website even if it is possible or even likely that a California resident can access [that] website." That California consumers cannot be shielded from health claims made on PuriTec's rest-of-the-world website, however, is not PuriTec's concern, so long as PuriTec informs California consumers on that website (or directs California consumers to the California website) that PuriTec's devices have not been certified by California and therefore no health or safety claims about those devices concerning drinking water can be made under California law. To borrow loosely from an old saying, you can lead a California customer to

consumer warnings about water treatment devices, but you can't make him heed them. That is all that is required of PuriTec as a practical matter.

The second point flows from the first. PuriTec argues that conforming to California law will be next to impossible if other states adopt website advertising schemes different from those of California. As we have just explained, PuriTec does not have to conform all of its website advertising to California law; it need only inform California customers that its devices have not been certified by California and therefore no health or safety claims regarding drinking water can be made under California law about those devices. The same approach can be used regarding the respective relevant laws from other states.

PuriTec then argues, as the third point, that it cannot be "expected to create completely different websites targeted at every state." Again, there is no need to create completely different websites targeted at every state. There is only a need to inform customers from particular states about the relevant law of those states. These kinds of state-focused consumer warnings are seen routinely in national print advertisements. An Internet website can surely be as accommodating. As our state high court has explained, "the federal system contemplates that individual states may adopt distinct policies to protect their own residents and generally may apply those policies to businesses that choose to conduct business within that state. [Citations.] It follows from this basic characteristic of our federal system that, at least as a general matter, a company that conducts business in numerous states ordinarily is required to make itself aware of and comply with the

law of a state in which it chooses to do business." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 105, 45 Cal.Rptr.3d 730, 137 P.3d 914 (2006).

We conclude that Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c), as applied to PuriTec's Internet website advertising, are not unconstitutional under the first-tier approach to dormant commerce clause analysis because they do not have the practical effect of directly controlling commerce wholly outside California.

b. Second-tier approach-balancing test

PuriTec contends that Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) are also invalid under the second-tier approach to dormant commerce clause analysis because their burden on interstate commerce significantly outweighs any legitimate local benefit.

As noted, the second-tier approach can be stated as follows: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike, supra*, 397 U.S. at p. 142, 90 S.Ct. 844; *accord, Ferguson, supra*, 94 Cal.App.4th at p. 1262, 115 Cal.Rptr.2d 258.)

PuriTec claims that the burden imposed on interstate commerce by Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) is clearly excessive in relation to

the putative local benefits. We disagree.

The health and safety of drinking water certainly constitutes a legitimate state interest. "In the areas affecting the health, life and safety of their citizens, the courts have allowed reasonable and non-discriminatory regulation." *People v. Fairfax Family Fund, Inc.*,, 235 Cal.App.2d 881, 883, 47 Cal.Rptr. 812 (1964) (citing *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). And the burden imposed on interstate commerce by Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) is not clearly excessive in relation to the local benefits to be derived. As the trial court aptly observed, "Because the technology exists to separate the California website from the [rest-of-the-world] website established by a company such as PuriTec, it is not a burden on interstate commerce for DHS to regulate what can be said about water purification products to California residents. PuriTec could and can easily structure its websites to inform California customers at the point of sale (the 'check out' page of the website) that its devices are not certified by the State of California, and that no health or safety claims relative to drinking water can be made under California law about PuriTec's devices." *See People v. Hsu*, 82 Cal.App.4th 976, 983, 99 Cal.Rptr.2d 184 (2000) [the fact that Internet communication can affect interstate commerce does not automatically cause a state statute, in which Internet use is an element, to burden interstate commerce; if a legitimate local concern is found, the extent of regulatory burden that will be tolerated depends on the nature of the local interest involved].)

PuriTec also argues that the putative local benefits are minimal because California consumers cannot be shielded from uncertified health claims made on other portions of PuriTec's website(s). As we discussed in the previous section of this opinion, while it is true California consumers cannot be shielded from uncertified health claims over the Internet, Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) provide such consumers with fair warning about those claims. It is up to the individual California consumer to heed that warning. In this way, putative local benefits can be realized.

We conclude that Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c), as applied to PuriTec's Internet website advertising, are not unconstitutional under the second-tier approach to dormant commerce clause analysis because the burden these statutes impose on interstate commerce is not clearly excessive in relation to their putative local benefits.

3. First Amendment-Commercial Speech

PuriTec lastly contends that Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c), as applied to website advertising, infringe upon commercial free speech protected by the federal Constitution's First Amendment. We disagree.

"The First Amendment's concern for commercial speech is based on the informational function of advertising." *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The First Amendment " 'accords

less protection to commercial speech than to other constitutionally safeguarded forms of expression,' " such as political speech. *Nagel v. Twin Laboratories, Inc.*, 109 Cal.App.4th 39, 46, 134 Cal.Rptr.2d 420 (2003) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). There are three reasons for the reduced protection. First, commercial speech is easier to verify, and second, commercial speakers act from profit motives; therefore, governmental regulation of such speech is less likely to chill its dissemination. *Nagel, supra,* 109 Cal.App.4th at pp. 46-47, 134 Cal.Rptr.2d 420; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 954-955, 969, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002). And third, because the government has the authority to regulate commercial transactions to prevent harm to the consumer, it similarly has the authority to regulate the speech connected to those transactions. *Nagel, supra,* 109 Cal.App.4th at p. 47, 134 Cal.Rptr.2d 420; *Kasky, supra,* 27 Cal.4th at p. 955, 119 Cal.Rptr.2d 296, 45 P.3d 243.

A four-part analysis has developed to determine whether state regulations on commercial speech are valid under the First Amendment. First, to be protected at all, the commercial speech must concern lawful activity and not be misleading. Second, the asserted governmental interest must be substantial. If these two factors are present, the regulation must directly advance the governmental interest, and finally, the regulation must not be more extensive than is necessary to serve that interest-i.e., there must be a " 'reasonable fit' " between the government's purpose and the means chosen to achieve it. *Central Hudson, supra,* 447 U.S. at p. 566, 100 S.Ct. 2343; *Board of Trustees, S.U.N.Y. v.*

Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *Kasky, supra,* 27 Cal.4th at p. 952, 119 Cal.Rptr.2d 296, 45 P.3d 243.

Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c), as applied to PuriTec's Internet website advertising, pass this four-part test.

First, selling water treatment devices concerns lawful activity and we will assume, for the sake of argument, that PuriTec's health claims regarding its devices are not misleading; consequently, the First Amendment applies.

Second, there can be no quibble that California's interest here is substantial. As noted, state regulation of health and safety claims concerning drinking water directly implicates a state's police power to protect the health and safety of its citizens. *See Fairfax Family Fund, supra,* 235 Cal.App.2d at p. 883, 47 Cal.Rptr. 812.

Third, the two statutes directly advance this interest by ensuring that health claims for water treatment devices are truthful.

PuriTec counters that the two challenged statutes do not target false or deceptive statements because the statutes apply equally to true and untrue statements in the uncertified device context. The two statutes, though, merely seek to ensure that health or safety claims for water treatment devices have been certified as accurate. Simply because true statements will be part of the certification process does not render that process a blind shot. The certification process is a *test* of truth, and thereby

targets false or deceptive statements; the true statements will be certified and the untrue ones will not be.

PuriTec also claims that Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) do not directly advance the accuracy of health claim allegations because California consumers can easily access the non-California part of PuriTec's website(s) or can link from that website to other information regarding particular water treatment devices. As we have noted previously, the trial court found, and it has not been disputed, that technology exists for PuriTec to separate its California website from its rest-of-the-world website, and that PuriTec can easily structure its websites to inform California customers at the point of sale (the "check out" page) that its devices are not certified by the State of California and therefore no health or safety claims relative to drinking water can be made under California law about those devices.

And fourth, for the reasons already set forth and for the one that follows, there is a " 'reasonable fit' " between California's purpose of ensuring the accuracy of health claim allegations regarding water treatment devices and the means chosen to achieve that purpose-the certification process. *Kasky, supra,* 27 Cal.4th at p. 952, 119 Cal.Rptr.2d 296, 45 P.3d 243. Because commercial speech is such "a sturdy brand of expression," traditional notions of prior restraint may not apply, and the kind of commercial speech at issue here can be constitutionally subjected to a "pre-screening arrangement" to ensure its accuracy. See *Central Hudson, supra,* 447 U.S. at p. 571, fn. 13, 100 S.Ct. 2343; *Shapero v. Kentucky Bar*

Assn., 486 U.S. 466, 476, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) (upholding a requirement that a lawyer have his solicitation letter approved by a state agency regarding the truthfulness of stated facts before mailing it out to potential clients).

Within the commercial speech realm, PuriTec also claims that Health and Safety Code section 116835(a) and Business and Professions Code section 17577.2(c) are unconstitutionally overbroad and unconstitutionally vague. We can dispense with these claims quickly.

The First Amendment's overbreadth doctrine does not apply to professional commercial advertising because it is unlikely that such speech is susceptible to being chilled by overbroad regulation. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-381, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Leoni v. State Bar*, 39 Cal.3d 609, 622, fn. 11, 217 Cal.Rptr. 423, 704 P.2d 183 (1985).

As for any unconstitutional vagueness, James Mead, PuriTec's owner, effectively conceded at trial that it was clear how PuriTec was to comply with the California certification law.

DISPOSITION

The judgment is affirmed.

We concur: RAYE and HULL, JJ.

IV. California Supreme Court Denial of Review

Court of Appeal, Third Appellate District
No. C052167
S156422

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE ex rel. EDMUND G. BROWN, JR., as Attorney General, etc.,

Plaintiff, Cross-defendant and Respondent,

v.

PURITEC LLC.,

Defendant, Cross-complainant and Appellant.

The petition for review is denied.

GEORGE
Chief Justice

Filed November 28, 2007
Frederick K. Ohlrich Clerk Deputy

V. Statutory Authorities

United States Constitution:

Article I, Section 8 (in part):

The Congress shall have power . . .

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

California Business & Professions Code:

17577. (a) The Legislature finds and declares that there have been situations where homeowners have been subjected to fraud, deception, and unfair dealing by certain promoters of water treatment devices. Water contamination problems throughout the nation have created concern among homeowners concerning the quality and healthfulness of home water for drinking. Some promoters of water treatment devices have made false, misleading, and unfair statements in connection with sale of water treatment devices, including, but not limited to, false, misleading, and unfair statements regarding general levels of water contamination, water contamination problems actually or potentially

affecting particular homeowners, actual or potential health risks associated with the consumption of water, and the features and performance of water treatment devices. As a result of false, misleading, and unfair statements, including statements that have the purpose or effect of alarming the public about the condition of water, many homeowners have been pressured into purchasing water treatment devices without the opportunity to verify the accuracy of the sales representations.

(b) The Legislature also finds and declares that current law does not afford homeowners who enter transactions for the acquisition of water treatment devices the right in all instances to cancel the transaction within three days of its consummation. Moreover, homeowners may be subjected to the loss of their homes through the foreclosure of liens securing financing of water treatment devices.

(c) The Legislature further finds and declares that the protection of homeowners and consumers from untrue and misleading statements and from unfair dealing is of the utmost importance.

(d) The intent and purposes of this article are to safeguard the public against deceit; to ensure, foster, and encourage fair dealing in the sale of water treatment devices; to prohibit misleading representations; to prohibit certain liens on real property; and to afford homeowners a reasonable and meaningful opportunity to rescind transactions for the acquisition of water treatment devices.

(e) This article shall be liberally construed to effectuate the intent and to achieve the purposes described in subdivision (d).

17577.1. For the purposes of this article, the following terms have the following meanings:

(a) "Contaminant" or "contamination" means any

health-related physical, chemical, biological, or radiological substance or matter in water.
(b) "Water treatment device" means any product that (1) is designed to alter the chemical or physical properties or characteristics of water or plumbing or the seller, lessor, or renter claims can alter the chemical or physical properties or characteristics of water or plumbing and (2) is used or sold, leased, or rented for use on residential real property primarily for personal, family, or household purposes. "Water treatment device" does not include any device that is regulated pursuant to Chapter 7.5 (commencing with Section 4040) of Part 1 of Division 5 of the Health and Safety Code.
(c) "Person" means any individual, partnership, firm, corporation, or association, or any employee or agent thereof.

Section 17577.2:
It is unlawful for any person to do any of the following in connection with the sale, lease, rental, offer to sell, lease, rent, or other disposition of water treatment devices:

. . . .

(c) Notwithstanding subdivision (a), make product performance claims or product benefit claims that the device affects health or the safety of drinking water, unless the device has been certified by the State Department of Health Services pursuant to Article 3 (commencing with Section 116825) of Chapter 5 of Part 12 of Division 104 of the Health and Safety Code. This subdivision does not apply to the making of truthful and nonmisleading claims regarding the removal or reduction of contaminants for which certification is not available pursuant to

Article 3 (commencing with Section 116825) of Chapter 5 of Part 12 of Division 104 of the Health and Safety Code.

. . .

California Health & Safety Code:

Section 116835 (in part):
(a) No water treatment device that makes product performance claims or product benefit claims that the device affects health or the safety of drinking water, shall be sold or otherwise distributed that has not been certified by the department or by another entity in accordance with subdivision (b). Water treatment devices not offered for sale or distribution based on claims of improvement in the healthfulness of drinking water need not be certified pursuant to this section.

. . .

Section 116840 (in part):
(a) The department, or any local health officer with the concurrence of the department, shall enforce this article.

. . .

(c) Any person, corporation, firm, partnership, joint stock company, or any other association or organization that violates any provision of this article shall be liable for a civil penalty not to exceed five thousand dollars ($5,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of the conduct is a

separate and distinct violation. The civil penalty shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

. . . .

VI. California Department of Health Services Communications & Regulatory Guidelines

Notice of Violation to PuriTec, LLC, October 22, 2002 (Plaintiff's Trial Exhibit 1) (in relevant part):

STATE OF CALIFORNIA -- HEALTH AND HUMAN SERVICES AGENCY

GRAY DAVIS, Governor

DEPARTMENT OF HEALTH SERVICES
DRINKING WATER PROGRAM

. . .

October 22, 2002

Mr. I. M. Mead
PuriTec
7251 W. Lake Mead Blvd. Suite #300
Las Vegas, NV 89128

NOTICE OF VIOLATION

Enforcement Log 02/082

Marketing of Uncertified Water Treatment Devices in California via the Internet

By receipt of this letter, you are officially notified that your company is marketing water treatment devices (home water treatment units) in California via the internet in violation of Section 116835 of the California Health and Safety Code and in violation of Section 17577.1 of the California Business and Professions Code. Section 116835 requires that a water treatment device must be certified by the California Department of Health

Services (Department) when a health benefit claim is made for the device. Section 17577.1 prohibits a number of unlawful activities related to selling water treatment devices. Section 116840 of the California Health and Safety Code authorizes the Department to refer these violations to the State Attorney General's Office for prosecution of civil penalties of up to $5000 per violation. For violations of a continuing nature, each day of the conduct is considered a separate and distinct violation.

The Water Treatment Device Certification Program was created by Senate Bill 2119 (Chapter 1247, Statutes 1986). This statute required the Department to adopt regulations to establish reliable methods for determining the performance of water treatment devices. One year after the effective date of the regulations, the sale of devices not properly certified was prohibited. The statute also established penalties for any violation of the Codes or the Department's certification requirements.

Since October 7, 1991, all devices that are sold on the basis of health claims have been required to be certified.

To correct the violations listed on the next page, you have the following options:

1. Immediately cease the advertising and sale of the device(s) listed on the next page and any other water treatment devices which are offered for sale in violation of the Department's Certification program.

2. Immediately change the advertising for the device(s) listed on the next page to specify that the device(s) cannot be sold in California. The operators of any phone/internet lines used to take orders must

also be instructed to clearly inform any California customers that the device is not available in California.

3. Immediately change the advertising for the device(s) listed on the next page to remove any uncertified health claims or implied health claims, or otherwise uncertified performance claims.

Only aesthetic claims may be made for uncertified water treatment devices marketed in California.

Aesthetic claims are those addressing the appearance, odor or taste of drinking water. (Copies of the website are enclosed.)

Your company's internet site must come into compliance within 30 days of receipt of this letter. If you do not correct the violations and notify the Department, The violations will be referred to the Attorney General's Office for prosecution.

Please review the California Health & Safety Code, Chapter 8.5 Water Treatment Devices, and California Business and Professions Code, Article 6 Water Treatment Devices, which established water treatment device certification requirements in California. Copies are available from our website at http://wwwdhs.ca.gov/ps/ddwemltechnicallcertificatio nlDevices .html. If you have any questions regarding this letter, please contact me at 916-324-3726 or ldyane@dhs.ca.gov.

Drinking Water Program
Guidance: Website Marketing February 2002
(Plaintiff's Trial Exhibit 5) (in relevant part):

The Department considers internet websites to be national marketing brochures, and as such, must comply with the requirements of the Device Certification Program.

If a residential water treatment device is marketed on a website on the basis of health claims and is certified in California, the claims made for the device must be consistent with its California certification.

If a residential water treatment device is marketed on a website on the basis of health claims but is not certified in California, the website should clearly state that the device is not available for sale in California. Every page of the website that includes health claims for the device should state, in a prominent and noticeable manner, that the device is not available for sale in California.
The notice should be in a font size at least as large as the maximum font size used to make ahealth claim.

It is not allowable to make health claims for an uncertified device, or health claims beyond those certified in California, and state that the claims do not apply in California. It is also not allowable to market the same device in two ways on a website: marketing claims for California residents in one place, and marketing claims for non-California residents in another.

Violation(s) of the Device Certification statutes and regulations will result in a Notice of Violation being issued to the marketer and the manufacturer. At our

discretion, we may also refer the violation(s) to the State Attorney General's Office for prosecution without additional notice.

The Department will routinely check manufacturers' websites during any application process (including annual renewals) and will conduct general internet searches for residential water filter sales. We will impose the consequences specified in H&SC Section 116840 if there are violations.

Section 116840 of the California Health and Safety Code (H&SC) states "The Department may suspend, revoke, or deny a certificate upon its determination . . - that the manufacturer, or any employee or agent thereof, has violated this article, any regulation adopted pursuant to this article (device program regulations), or Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code (False Advertising Law)."

H&SC Section 116840 provides for the assessment of civil penalties up to $5000 for each violation. Where the conduct constituting a violation is of a continuing nature, each day of the conduct is a separate and distinct violation. In the case of website violations, we will count days of violation from the date we first observe the violation(s) to the date we are notified and verify that the website is in compliance with California law.